IN THE

Supreme Court of the United States

October Term, 1954

No. 236

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

STEVE NELSON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

HARRY F. STAMBAUGH
Special Counsel
WILLIAM F. CERCONE
Special Deputy Attorney General
FRANK P. LAWLEY, JR.
Deputy Attorney General
HARRINGTON ADAMS
Deputy Attorney General
FRANK P. TRUSCOTT
Attorney General
Attorneys for the Commonwealth of Pennsylvania

ALBERT A. FOIS
Assistant District Attorney
JAMES F. MALONE, JR.
District Attorney
Allegheny County

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Commonwealth of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above cause.

OPINIONS OF COURTS BELOW

The opinion of the Court of Quarter Sessions of Allegheny County, Pennsylvania, is not separately reported, but is incorporated as part of the opinion of the Superior Court of Pennsylvania (App. 29a) reported in 172 Pa. Superior Ct. 125, 92 A. 2d 431. The opinion of the Supreme Court of Pennsylvania (App. 59a) is reported in 377 Pa. 38, 104 A. 2d 133. The order of the Supreme Court of Pennsylvania denying the petition by the Commonwealth of Pennsylvania for reargument (R. 89) is noted in 377 Pa. at page 60.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954. The order of the Supreme Court of Pennsylvania denying the petition by the Commonwealth of Pennsylvania for rehearing was entered on April 27, 1954.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Does a state have the power to make criminal acts committed within its territory, which advocate overthrowing of the government of the United States by force and violence?

2. Did the Smith Act of June 28, 1954, as later codified in the Federal Criminal Code of June 25, 1948, (18 U. S. C. A. 2385), supersede Section 207 of the Pennsylvania Penal Code of June 27, 1939, (Pamphlet Laws 872, 18 Purd. Penna. Stat. Ann. Section 4207)?

3. Did the Supreme Court of Pennsylvania err in quashing the indictment against the respondent and reversing the judgment of conviction?

4. Did the fact that the respondent was later convicted in the United States District Court for the Western District of Pennsylvania under Section 371 of the Federal Criminal Code amount to double punishment for the same offense, or place the respondent in double jeopardy?

STATUTES INVOLVED

Section 2385 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808, 18 U. S. C. A. 2385:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> "Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> "Whoever organizes or helps or attempts to organize any society, group, or

assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. June 25, 1948, c. 645, 62 Stat. 808."

Section 4207 of the Pennsylvania Penal Code of 1939, 18 Purd. Penna. Stat. Ann. 4207:

"The word 'sedition', as used in this section, shall mean:

"Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is:

"(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

"(b) To encourage any person to take any measures or engage in any conduct:

with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

"(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

"(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

"The word 'sedition' shall also include:

"(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

"(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of ac-

complishing political reform or change in government.

"(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

"(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any of the policies or purposes thereof are seditious as hereinbefore defined.

"Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both. 1939, June 24, P. L. 872, §207."

STATEMENT OF THE CASE

On October 17, 1950 (R. 19), in the Court of Quarter Sessions, Allegheny County, Pennsylvania, the respondent, Steve Nelson, was indicted under the Pennsylvania Sedition Act (Sec. 207 of Pennsylvania Penal Code of June 24, 1939, Pamphlet Laws 872, 18 Purdon's Stat. Ann. Sec. 4207).

The indictment charged, inter alia, that the defendant, Steve Nelson:

Encouraged persons to engage in conduct with a view to overthrowing and destroying by force the government of Pennsylvania and of the United States (App. 1a-2a)

Published and distributed printed matter encouraging persons to engage in conduct with a view to overthrowing and destroying by force the government of Pennsylvania and of the United States (App. 5a-6a)

The indictment further charged that:

Such publications proclaimed that the dictatorship of the proletariat cannot arise by peaceful development, but can arise only as a

result of smashing the bourgeois machine and army.

That this Soviet organization alone is capable of smashing and finally destroying the bourgeois and bureaucratic and judicial apparatus and this can be done only by revolution (App. 11a).

Voting alone for the communist program is not sufficient to overthrow and destroy the dictatorship of the capitalist class in the fight to establish the dictatorship of the proletariat in the United States. (App. 11a-12a).

"* * * the Communists everywhere support every revolutionary movement against the existing social and political order of things. * * *" (App. 13a).

"The Communists * * * openly declare that their ends can be attained only by the forcible overthrow of all existing and social conditions. Let the ruling classes tremble at a Communist revolution." (App. 13a)

The indictment quoted many additional passages from publications which, it charged, were distributed by the defendant. (App. 10a-18a)

The defendant pleaded not guilty and on December 23, 1950, filed a motion (App. 20a) to quash the indictment upon the grounds, inter alia, that the Pennsylvania Sedition Act of 1939

offended Amendment XIV of the Constitution of the United States by depriving citizens of their liberties and property without due process of law and punishing the defendant for exercising the freedom of speech, press and assembly; and was superseded by the Federal Sedition Act of June 25, 1948, 18 U. S. C. A. Sec. 2384-5-6, which, the motion asserted, completely covered this field of legislation (App. 22a).

By order of December 26, 1950, this motion to quash was dismissed (App. 27a). After a trial beginning on December 4, 1951 and ending on January 30, 1952, a verdict of guilty on twelve counts was returned by the jury on January 30, 1952 (R. 20).

Defendant's motions for a new trial (R. 30) and in arrest of judgment (R. 3) were denied in an opinion (App. 29a) filed by Judge Montgomery on June 26, 1952.

The defendant, Nelson, was sentenced to pay a fine of $10,000, the costs of prosecution, and to undergo imprisonment for a term of 20 years.

The judgment of sentence of the Court of Quarter Sessions was affirmed by the Superior Court on November 12, 1952. On appeal the Supreme Court reversed on the ground that the Smith Act superseded the Pennsylvania Sedition Act and conviction in the state court would result in double punishment (377 Pa. at 71).

The majority opinion was written by Mr. Justice Jones and the concurring opinion was filed by Chief Justice Stern and Justices Stearne and Chidsey. Justice Bell dissented. Justices Musmanno and Arnold took no part (App. 59a).

REASONS FOR ALLOWING CERTIORARI

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1. The Supreme Court of Pennsylvania decided a federal question of substance in a way, we submit, not in accord with applicable decisions of this Court. The majority opinion held that Section 2385 of the Federal Code of Crimes and Criminal Procedure (embodying the Smith Act of June 28, 1940, 54 Stat. 670) making it a crime to advocate overthrowing the government of the United States or of a state by force or violence, superseded the Pennsylvania Sedition Act contained in Section 4207 of the Pennsylvania Penal Code of 1939 (18 Purd. Penna. Stat. Ann. 4207) which made it a crime to encourage any person to engage in any conduct with a view to overthrowing or destroying the government of the State of Pennsylvania or of the United States by force. Inconsistency was found, not between statutory or administrative regulations of the federal and state governments; but in the fact that the federal government made an act criminal and the state legislature made a similar act criminal. The decisions of this Court are discussed infra pp. 30-45.

2. The decision of the Supreme Court of Pennsylvania is in conflict with the decisions of the highest courts of other states which have held that a state statute making it a crime to advocate overthrowing the government of the United States by force or violence was not inconsistent with or superseded by an act of Congress. The state decisions are discussed infra on pp. 16-24.

3. The majority opinion of the Pennsylvania Court overlooks or ignores Section 3231 of the Federal Code of Crimes and Criminal Procedure which provides that:

> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." (infra, p. 42).

4. The majority opinion of the Pennsylvania Court overlooks the fundamental principle laid down by this Court that in our federal system the administration of criminal justice is predominantly committed to the care of the states (infra, pp. 38-45).

5. The effect of the decision of the Court below is to deprive courts of every state of jurisdiction to try and punish persons accused of advocating the overthrow of the national government by force and violence. If prosecution is restricted to the federal courts, Communists,

by dilatory and frustrating tactics may protract and delay trails in federal courts to such an extent that only a comparatively small proportion of these subversive offenders will be tried or sentenced.

In the **Dennis case** (341 U. S. at p. 497), the trial lasted over 9 months and the record covered 16,000 pages. In the case at Bar, the trial began on December 4, 1951, (transcript of trial Vol. I, p. 2), and ended in a verdict on January 30, 1952 (R. 20), and the proceedings of the trial covered 2700 pages, exclusive of voluminous exhibits.

ARGUMENT

I.

A State may punish acts committed within its territory, which advocate the overthrow of the government of the United States by force or violence.

The majority opinion of the Supreme Court of Pennsylvania, we submit, is in conflict with the decisions of this Court and of the highest Courts of other states.

In **Gitlow v. New York**, 268 U. S. 652 (1925), in considering a New York statute which provided that any person who "advocates, * * * the overthrowing or overturning of organized government by force or violence" shall be guilty of a felony, the Supreme Court of the United States, by Mr. Justice Sanford, said:

> "* * * And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. People v. Lloyd,

304 Ill. 23, 34. See also, State v. Tachin, 92 N. J. L. 269, 274; and People v. Steelik, 187 Cal. 361, 375. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. * * *" (p. 668)

In **Whitney v. California,** 274 U. S. 357 (1927), this Court sustained the constitutionality of a California statute which made it a felony for anyone to knowingly become a member of any organization advocating unlawful acts of force and violence as a means of accomplishing change in industrial ownership or any political change.

This Court said:

"By enacting the provision of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. * * *" (p. 371)

In **Gilbert v. Minnesota**, 254 U. S. 325 (1920), a Minnesota statute making it a misdemeanor to advocate that citizens of the State should not aid or assist the United States in prosecuting or carrying on a war, was held to be constitutional. The Supreme Court said that the State

> "* * * has power to regulate the conduct of its citizens and to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the welfare of the **Nation and State**. To do so is not to usurp a National power, it is only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag.
>
> "We concur, therefore, in the final conclusion of the court, that the State is not inhibited from making 'the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.'
>
> "The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the State. As counsel for the State say, 'The act under consideration does not relate to the raising of armies for the national defense, nor to rules

and regulations for the government of those under arms. It is simply a local police measure, aimed to suppress a species of seditious speech which the legislature of the State has found objectionable. * * * On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a danger of it is a proper exercise of the power of the State. * * * " (pp. 331-332)

The Espionage Act of June 15, 1917, 40 Stat. 217, was in force when the cases of Gitlow v. New York, 268 U. S. 652, and Whitney v. California, 274 U. S. 357, were before this Court.

The statement to the contrary in the majority opinion (App. 76a-77a) (377 Pa. at p. 74) is, we respectfully submit, incorrect:

Section 3 of the Act of June 15, 1917, was as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mu-

> tiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The Act of May 16, 1918, 40 Stat. 553, amended this Act of June 15, 1917. It did not strike out any of the language of Section 3 quoted above, but added additional prohibitions to this Section 3.

The Act of March 3, 1921, 41 Stat. 1359, repealed the Act of May 16, 1918. It repealed only the prohibitions which had been added by the Act of May 16, 1918, to the original Section 3 as contained in the Act of June 15, 1917.

The Act of 1921 expressly preserved the provisions of the Act of June 15, 1917, as originally contained in that act.

The language of the Act of March 3, 1921, was as follows:

> * * * That the Act entitled 'An Act to amend section 3, title 1, of the Act entitled "An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United

> States, and for other purposes," approved June 15, 1917 (Fortieth Statutes, page 217), 'and for other purposes,' approved May 16, 1918 (Fortieth Statutes, page 553), be, and the same is hereby, repealed, and that said section 3 of said Act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted."

The following language from the Act of June 15, 1917, "cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, * * * shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both", is substantially repeated in Section 2387 of the United States Code of Crimes and Criminal Procedure, approved June 25, 1948, except that the imprisonment is reduced to ten years.

In **State v. Tachin,** 92 N. J. Law 269, 106 Atl. 145 (February 25, 1919), the Supreme Court of New Jersey upheld a State statute, which made it a crime to attempt by speech to incite hostility and opposition to the government of the United States. That Court said:

> "* * * If the federal government, which is a government of delegated powers only, under the Tenth Amendment to the federal Constitution, can properly protect by its

criminal law the honesty and purity of elections, as the Siebold Case decided, much more can the State government protect its own existence against sedition which, although aimed directly at the federal government, must indirectly affect the security of the state government. * * *"

A writ of error to the Supreme Court of the United States was dismissed with costs on motion of counsel for plaintiffs in error (254 U. S. 662).

In **Nelson v. Wyman,** N. H. , 105 A. 2d 756, decided on April 30, 1954, the plaintiff filed a petition with the Supreme Court of New Hampshire asking for declaratory judgment that the Subversive Activities Act of that state was unconstitutional. This Act of 1951 provided that:

"It shall be a felony for any person knowingly and willfully to

"(a) commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force or violence, or,

"(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the state of New Hampshire or of any political subdivision of either of them; * * * *" (N. H. Laws, 1951, pp. 412-413)

The Supreme Court of New Hampshire ruled that the statute was constitutional, saying:

"* * * Whatever importance has been ascribed to these duties and powers in decisions dealing with federal legislation, their existence has not been applied in connection with state legislation, to exclude consideration of the well recognized power of each state to regulate the conduct of its citizens and to restrain activities which are detrimental not only to the welfare of the state but of the nation. 'The state is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.' Gilbert v. Minnesota, 254 U. S. 325, 331. 'There is nothing in the federal constitution in any way granting to the federal government

"the exclusive right to punish disloyalty.' People v. Lloyd, 304 Ill. 23, 33."

Further, the Court refused to follow the Pennsylvania Supreme Court in this Nelson case, and ruled that the Smith Act did not supersede the New Hampshire statute:

> "The enactment by Congress of the Smith Act (18 USC Sec. 2385), which defines and penalizes sedition and subversive activities against the governments of the United States, the states or any of their subdivisions, does not preclude state legislation on the same subject matter. Insofar as Pennsylvania v. Nelson, 104 A. 2d 133, gives support to the proposition that it does, we do not adopt it." (104 A. 2d at p. 769)

What was said in **Gilbert v. Minnesota,** supra, pp. 18-19, in regard to advocating that citizens do not aid the United States in prosecuting a war, is equally applicable to acts in Pennsylvania encouraging persons to overthrow the government of the United States by force or violence.

Acts in Pennsylvania fomenting an insurrection against the government of the United States or instituting a movement to overthrow the government of the United States, would seriously affect and disturb the peace and dignity of the Commonwealth of Pennsylvania;

and would result in wide-spread destruction of lives and property of Pennsylvania citizens. Such acts might lead to the use of explosives and incendiary bombs, and sabotage of airplanes and railroad trains and widespread violations of the laws of Pennsylvania.

The Commonwealth of Pennsylvania would not be required by anything in the Federal law to keep hands completely off and leave the preservation of peace and order entirely to Federal authorities.

This Court has frequently said that the national or the state government need not wait until the subversive group has perfected its plan and only the signal is awaited for the blow to be struck: **Dennis v. United States**, 341 U. S. 494, 509 (1951); **Gitlow v. New York**, 268 U. S. 652, 669 (1925). They may make it a crime to **advocate** such measures.

An attempt to overthrow the Federal government would begin with, or at least involve, the overthrow of State governments. If an insurrection was begun, the first measure would be to summon the local or State Police or the National Guard. The fact that the primary or ultimate goal was to overthrow the Federal government would not soften the impact of a blow against the State government or lessen the slaughter of human beings or destruction of property in the State. The revolution would

have to begin in one or more states. One of the first essentials would be to wreck and destroy Pennsylvania's vast facilities for production of munitions and implements of war and the means of transportation.

The police power—the right of self preservation gives to the Commonwealth of Pennsylvania the inherent and undoubted power to suppress such insurrection, and to enact laws for the punishment of offenders.

Pennsylvania does not have to depend wholly upon acts of the Federal government in the prosecution of the guilty, any more than its police and soldiers are required to stand-by and wait for the Federal forces to arrive and defend.

Pennsylvania has the absolute right to protect human lives and property within its boundaries and this right the Smith Act does not, indeed, cannot, take away or impair.

As was said in **Gitlow v. New York**, 268 U. S. 652, quoted supra:

> "* * * this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. * * * *"

In discussing the power of the state to make it a crime to advocate the overthrow of the government of the United States, it has frequently

been pointed out that the state is a part of the system of government which was created by the Constitution of the United States. Our government has been called a dual system, but it still is a unitary system. It has been frequently said that the constitution looks to an indestructible union of indestructible states.

Thus, in **Gilbert v. Minnesota**, 254 U. S. 325 (1920), quoted supra, Mr. Justice McKenna said:

> "* * * The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. * * * this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all. * * * The same view of the statute was expressed in State v. Holm, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1817, abrogated or superseded the statute, the court declaring that the fact that the citizens of the State are also citizens of the United

States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from enforcing such duty. 'The same act,' it was said, 'may be an offense or transgression of the laws of both' Nation and State, and both may punish it without a conflict of their sovereignties. * * *" (pp. 329-330)

In the footnote to page 330 of this opinion, the Supreme Court cited and quoted from **Gustafson v. Rhinow**, 144 Minn. 43, as follows:

"In Gustafson v. Rhinow, 144 Minnesota, 415, the Supreme Court of Minnesota sustained a law of the State giving to soldiers who served in the war against Germany $15 for each month or fraction of a month of service, against an attack that the soldiers were soldiers of the United States. The court expressed the concern and interest of the State as follows: 'It is true that the Federal government alone has power to declare war, but having done so, the government and people of Minnesota became bound to defend and support the national government. While the states of the nation are sovereign in a certain field, they are also members of the family of states constituting the national organization.'"

In **People v. Lloyd**, 304 Ill. 23, 136 N. E. 505 (1922), in holding constitutional a statute

which made it a felony to advocate the overthrow by violence or other unlawful means of the form of government secured to citizens of the United States and of the several states, the Supreme Court of Illinois said:

> "* * * The citizens of this state are citizens of the United States, and the citizens of the United States residing within the borders of this state are citizens of this state. Each citizen owes a duty to these two separate sovereignties. The state is a part of the nation, and owes a duty to the nation to support the efforts of the national government to secure the safety and protect the rights of its citizens, and to preserve, maintain, and enforce the sovereign rights of the nation against public menace, and to that end the state may require its citizens to refrain from any act which will interfere with or impede the national government in effectively defending itself against such public enemies. It is the duty of all citizens of the state to aid the state in performing its duty as a part of the nation, and the fact that such citizens are also citizens of the United States and owe a direct duty to the nation does not absolve them from their duty to the state or preclude the state from enforcing such duty. * * *" (p. 511)

II.

Section 2385 of the Federal Criminal Code of June 25, 1948, does not supersede the Pennsylvania Sedition Act (Section 207 of the Pennsylvania Penal Code of June 24, 1939).

That the Pennsylvania Sedition Act is not superseded follows from the following considerations:

(a) No provision or word of Section 2385 expresses any intent whatever to supersede the Pennsylvania statute.

(b) There is no inconsistency or conflict at all between the Federal act and the Pennsylvania act.

(c) Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948, expresses clearly the intent not to supersede the Pennsylvania Sedition Act.

The provision of each statute makes it a crime to commit acts for the purpose of overthrowing the government of the United States or of Pennsylvania by force or violence.

There is, however, no inconsistency between any provision of the Federal act and any of the State act.

Even though the definitions of the crime of advocating overthrow of government by force are, in substance, identical, there is no conflict. Each crime so defined is an offense against one sovereign only. For its own preservation, each government may separately prescribe and punish acts of sedition and acts so committed with intent to overthrow the state or federal government by force or violence.

As there is no conflict, each act can be enforced independently of the other, by officials of the United States and of Pennsylvania acting separately.

In further support of our position that the Pennsylvania provision was not superseded by Section 2385 of the Federal Criminal Code, we submit:

The decision of this Court in Gilbert v. Minnesota, 254 U. S. 25, rules the instant case.

In that case, the Supreme Court held that Section 3 of the Federal Espionage Act of June 5, 1917 (40 Stat. 217), did not supersede the statute of Minnesota.

Section 3 of the Espionage Act provided:

> "* * * * whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or

naval forces of the United States, or shall willfully obstruct the recruiting of enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." (p. 219)

The Minnesota statute provided:

"* * * * * It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States. * * *

"* * * * * It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States.' " (pp. 326-327)

The appellant specifically objected that the Minnesota statute was superseded by the Federal act.

In holding that the Federal statute did not **supersede**, the Supreme Court said:

> "* * * The same view of the statute was expressed in State v. Holm, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the statute, the court declaring that the fact that the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from enforcing such duty. **'The same act'** it was said, **'may be an offense or transgression of the laws of both' Nation and State, and both may punish it without conflict of their sovereignties.***"
> (Emphasis supplied) (pp. 329-330)

In most decisions in which a Federal statute has been held to supersede a State statute, there were involved conflicting **regulations** or other administrative provisions.

The majority opinion cites no decision of this Court which holds that a statute of Congress making an act a crime superseded a State statute making the same act a crime.

The Supreme Court of the United States has repeatedly held that the intent of Congress to supersede the exercise of the police powers of the states must be clearly manifested; and that the repugnance and conflict must be so direct

and positive that the two acts cannot be reconciled or consistently stand together.

Thus, in **Kelly v. Washington**, 302 U. S. 1 (1937), Chief Justice Hughes said:

> "* * * The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" (p. 10)

Other decisions to the same effect are:

Missouri, Kansas and Texas Railway Company v. Harris, 234 U. S. 412;

Maurer v. Hamilton, 309 U. S. 598;

Southern Pacific Co. v. Arizona, 325 U. S. 761;

Allen-Bradley Local v. Board, 315 U. S. 740;

Welch Co. v. New Hampshire, 306 U. S. 79.

This rule also applies if the argument is based on some contention that the scope of the Federal act is such as to indicate an intent to supersede a State statute.

In **Cloverleaf Co. v. Patterson**, 315 U. S. 148 (1942), Mr. Justice Reed said:

> **"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."** (Emphasis supplied) (pp. 155-156).

The ruling in **Hines v. Davidowitz**, 312 U. S. 52 (1941), was based solely on the special ground that the registration of aliens by Pennsylvania would interfere with the foreign relations of the United States.

This basis was clearly pointed out in the opinion which stated:

> "* * * the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government * * *
>
> "* * * the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens. * * *
>
> "* * * it is of importance that this legislation is in a field which affects **international relations, the one aspect of our gov-**

ernment that from the first has been most generally conceded imperatively to demand broad national authority. * * *

"* * * **Any concurrent state power** that may exist **is restricted to the narrowest of limits;** * * *

"* * * power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law. * * *" (pp. 66-68) (Emphasis supplied)

The Hines case was clearly narrowed and based upon the supreme power of the Federal government in foreign relations in **Allen-Bradley Local v. Board,** 315 U. S. 740 (1942), in which Mr. Justice Douglas said:

"* * * In the Hines case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any concurrent state power that may ex-

ist is restricted to the narrowest of limits.' p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. Maurer v. Hamilton, supra, and cases cited. Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard." (p. 749)

Again in **United States v. Pink,** 315 U. S. 203 (1942), Mr. Justice Douglas said:

"We recently stated in Hines v. Davidowitz, 312 U. S. 52, 68, that the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority'; and that any state power which may exist 'is restricted to the narrowest of limits.' There, we were dealing with the question as to whether a state statute regulating aliens survived a similar federal statute. We held that it did not. Here, we

are dealing with **an exclusive federal function.** * * * " (p. 232) (Emphasis supplied)

The Federal government has not taken and does not now take the position, we believe, that the Smith Act superseded the Sedition Act of Pennsylvania or any other state, and has not objected to the enforcement by the states of these laws.

We found little relevant material in the proceedings of Congress, but refer to a copy of a letter written by the Honorable Howard W. Smith, author of the Smith Act and quoted in the dissenting opinion of Mr. Justice Bell (App. 97a-98a).

If we look at the Federal statute from the vantage of history, we find that prior to the Federal Constitution the states possessed and exercised complete police power over crimes of every sort. The Constitution of the United States set up no federal criminal code or body of criminal law. As was said by Mr. Justice Douglas in **Jerome v. United States,** 318 U. S. 101, (1943):

" * * * Since there is no common law offense against the United States (United States v. Hudson, 7 Cranch 32; United States v. Gradwell, 243 U. S. 476, 485), **the administration of criminal justice under our federal system has rested with the**

> **states,** except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See United States v. Lanza, 260 U. S. 377; Hebert v. Louisiana, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." (pp. 104-105) (Emphasis added).

Today there are no federal crimes except those created by statute within the limited and enumerated powers of Congress. The Federal Constitution conferred upon Congress no general police power and no general power to prohibit or punish crime.

In **Rochin v. California,** 342 U. S. 165 (1952), Mr. Justice Frankfurter said:

> **"In our federal system the administration of criminal justice is predominantly**

committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const., Art. I, §8, cl. 18. Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, §10, cl. 1, in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments." (p. 168) (Emphasis added)

Again, in **Malinsky v. New York**, 324 U. S. 401 (1945), Mr. Justice Frankfurter in a concurring opinion said:

"Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, **the Constitution left the domain of criminal justice to the States.** The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any 'Bill of Attainder' or 'ex post facto law.'" Constitution of the United States, Art. I, §10. This freedom of action remained with the States

until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws." (pp. 412-413) (Emphasis added)

The majority opinion cites the case of **Hines v. Davidowitz**, 312 U. S. 52, and says

"* * * the act of Congress may touch a field in which the federal interest is so dominent that the federal system will be assumed to preclude enforcement of state laws on the same subject. * * *" (App. 68a, 377 Pa. at p. 63)

The Hines case was based on the exclusive power of Congress over foreign relations.

The majority opinion cites no case in which this court has held that the enactment of a federal statute making an act a crime supersedes a state statute making a similar act a crime.

The question whether a federal enactment creating a crime supersedes a state statute cre-

ating a similar crime must be determined in the light of the decisions which hold that the Federal Constitution left the domain of criminal justice to the States" (**Malinski v. New York,** quoted supra at p. 40); and that "In our federal system the administration of criminal justice is predominantly committed to the care of the States" (**Rochin v. California,** quoted supra at p. 39); and that "the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress" (**Jerome v. United States,** quoted supra at p. 38).

The fundamental truth so authoritatively declared by this Court in these excerpts was recognized and embodied by Congress in positive enactment in section 3231.

Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948, expresses clearly the intent not to supersede the Pennsylvania Sedition Act.

Section 3231 provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> "Nothing in this title shall be held to take away or impair the jurisdiction of the

courts of the several States under the laws thereof." (p. 243)

The words "nothing in this title" mean Title 18 of the Federal Code of Crimes and Criminal Procedure. The title of the Act of June 25, 1948, 62 Stat. 683, is as follows:

> "An Act
>
> "To revise, codify, and enact into positive law, Title 18 of the United States Code, entitled 'Crimes and Criminal Procedure'." (p. 683)

"This title", therefore, includes every provision in the Federal Court relating to sedition and particularly Section 2385, quoted supra.

"Jurisdiction", in this title, is the power to indict, try and punish crimes, and is not taken away or impaired.

If "jurisdiction" of the courts of the several states, under the laws thereof, is not taken away or impaired, then the power of the Court of Quarter Sessions is not superseded or suspended by Section 2385 of the Federal Code.

The language of the second sentence of Section 3231, quoted above supra, is broad, general and all inclusive. No intent is evidenced to except or exclude State sedition acts.

Section 2385 of the Federal Code is clearly a law "in this title".

The Pennsylvania Sedition Act is included in "the laws thereof", that is, the laws of the several states.

Section 3231 is one of the most fundamental provisions in Title 18. This section is inserted in the title which deals with crimes and criminal procedure, and necessarily and indubitably applies to the jurisdiction of the courts of the several states to hear and determine cases involving crimes under the laws thereof. It is difficult to conceive of any action that takes away or impairs the jurisdiction of the State courts in criminal matters more completely than a ruling that a Federal statute has superseded a State statute defining and punishing a crime.

We therefore, interpret Section 3231 to mean that it shall not take away or impair the jurisdiction of the State courts to hear and decide criminal cases if the crime is a violation of the State law.

Under point I of this petition, we have cited decisions of the Supreme Court of the United States holding that a State may make it a crime to commit acts to overthrow the government of the United States.

Therefore, nothing in Title 18 of the Federal Code supersedes the Pennsylvania Sedition

Act nor the jurisdiction of the Pennsylvania courts to enforce it.

Section 2385 of the Federal Penal Code and the Pennsylvania Sedition Act each deal solely with crime and criminal procedure, and, therefore, fall within the scope of the police powers of the respective governments.

III.

The defendant was not placed in double jeopardy.

Amendment V of the Federal Constitution provides:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *" (p. 30)

This provision does not apply because:

(1) A crime created by the Pennsylvania Sedition Act and the crime created by the Smith Act are not "the same offense".

This point was conclusively established in **Gilbert v. Minnesota,** quoted supra, p. 31, in which this Court held that the offenses created by the Minnesota statute and by the Federal Espionage law were separate.

In **United States v. Lanza,** 260 U. S. 377 (1922), Mr. Chief Justice Taft said:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. * * * Here the same act was an of-

> fense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy." (382)

To the same effect see **Hebert v. Louisiana**, 272 U. S. 312, 314 (1926).

So, in **United States v. Lanza**, 260 U. S. 377 (1922), in discussing two convictions for the same act of the defendant under the Federal law and a statute of the State of Washington, Mr. Chief Justice Taft said:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." (382)

The Court expressly rejected any explanation that the prohibition amendment had authorized a proceeding by the State. Mr. Chief Justice Taft said:

> "To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded. * * * " (381)

(2) The defense of double jeopardy is the defense of **former** jeopardy and can be set up only in a second or later trial. In the case at bar the defendant could not establish any defense of former jeopardy. The statement in the majority opinion that Nelson was later indicted and tried in the District Court of the United States is legally irrelevant.

(3) To fall within Amendment V both offenses must be against the Federal Government, not as here, one against Pennsylvania

and the other against the United States. In **Jerome v. United States,** 318 U. S. 101 (1943), Mr. Justice Douglas said:

> "* * * In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See United States v. Lanza, 260 U. S. 377; Hebert v. Louisiana, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." (pp. 104-105)

(4) Amendment V is a restriction upon the Federal government only, and not upon the states. This amendment does not apply at all to a trial in a State court. As Chief Justice Taft said in **United States v. Lanza,** 260 U. S. 377 (1922):

> "* * * The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government (Barron v. City of Baltimore, 7 Pet. 243, 8 L. Ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of

the federal government after a first trial for the same offense under the same authority. * * *." (382)

We find no provision in the Federal Constitution against "double jeopardy", unless there are two trials in courts of the United States. Under the facts of this case, we find, Amendment V does not apply.

HARRY F. STAMBAUGH
Special Counsel
WILLIAM F. CERCONE
Special Deputy Attorney General
FRANK P. LAWLEY, JR.
Deputy Attorney General
HARRINGTON ADAMS
Deputy Attorney General
FRANK F. TRUSCOTT
Attorney General
Attorneys for the Commonwealth of Pennsylvania

ALBERT A. FIOK
Assistant District Attorney
JAMES F. MALONE, JR.
District Attorney of Allegheny County